

‘Whaling In the Antarctic’:

A Judgment by the International Court of Justice and what could happen in Future due to that

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Abstract

In March this year the International Court of Justice made a judgment about the case ‘Whaling In the Antarctic’ where Japan is blamed by Australia to hunt whales in the Southern Ocean. The Court decided that Japan’s program JARPA II is not conforming to the assumed moratorium of the International Whaling Commission and hence it is to stop immediately. The relation to the Southern Ocean, and that endangered species are a subject, as well as the compliance of international conventions, this case is important for the future of Antarctica and the Antarctic Treaty.

After the judgment there were assumptions if Japan will abide to it, and a few weeks later Japan came up with the news to design a new program which will be conform to the judgment and the moratorium. Currently it is unsure what will happen and predictions are not easy to make. This case is unprecedented and there are no other cases to compare it to.

This critical review will investigate the major information about legislation, as well as the driving forces and threats for whaling in Japan.

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1 Introduction

Whale hunting by humans has been a big part of history in Antarctica. Whalers were the first humans to build huts and stations on land in the Southern Ocean. This was before the continent came into focus to nations who wanted to claim new land. Whaling was the first significant impact by humans to the Antarctic ecosystem.

In the early decades it was a hard and dangerous job being a whaler. They braved extreme elements and hunted whales in small boats. Since then there have been many developments in the hunting technique and innovations in modern ships that make whale hunting more efficient. Over the years many species of whales have been reduced to small numbers– some species are now considered endangered and could go extinct. Other circumstances have influenced the popularity of whaling including the fact that there were population increases which lead to an increase of consumers who wanted whale meat.

The increasing awareness of people to environmental pollution and species extinction lead to a rethinking of the whaling business in the 2nd third of the 20th century. The purpose of whaling itself was challenged. In 1946 the International Whaling Commission (IWC) was founded, under the International Convention for Regulation of Whaling. Commercial whaling was prohibited in 1986 by a moratorium. Since then two sanctuaries for whales have been installed. One of the sanctuaries is in the Southern Ocean, around Antarctica. (Anon, n.e.-a)

Japan has stopped commercial whaling due to the moratorium; however, it has installed a program of whaling for a scientific purpose (JARPA II). That program includes whaling in the Southern Ocean as well.

From the beginning NGO's claimed that the program is just an excuse for the Japanese to use whale meat commercially. The actions of Japan have been attacked worldwide by indirect protesting via 'information politics' and 'moral advocacy', like (Eilstrup-Savignon & Phelps Bondaroff, 2014) described. In the meantime a direct form of protesting has occurred. This form is called 'Direct Enforcement' (DE), which includes the actions of the Sea Shepard Conservation Society (SSCS). Since the early 2000's the SSCS has tried to hinder the Japanese whalers. They have taken action against Japanese whaler's ships which have made it impossible for them to catch whales. Due to those indirect and direct actions the awareness to the special case increases in both the public and international politics. (Eilstrup-Savignon & Phelps Bondaroff, 2014)

The Australian government handed in an application claiming that Japan infringed the IMC moratorium to the International Court of Justice (ICJ). Australia asserts Japans program of whaling (JARPA II) is not for a scientific purpose and that it does not conform to the International Convention of Regulation of Whaling – making it in breach of other agreements. (Anon, 2014b) The case was taken by the ICJ and on the 31 March 2014 the judgment was made and published.

In its judgment the ICJ declared that JARPA II does not conform to the conventions assumed by Japan and they are to stop immediately. (Anon, 2014b) Japan accepts the decision and declared to abide by the judgment (Marszalek, 2014; Soble & Smyth, 2014). Opponents of whaling and environmental protection activists were doubtful about that statement (Anon, 2014c). Two weeks after the judgment Japan announced to design a new program which they said would comply with the conventions, starting in 2015. The new program has been designed and the Japanese applied to the IWC Scientific Committee where scientist will have to prove the content and make a decision about a permit. (Fensom, 2014; Osborne, 2014) Despite their statement to abide by the rules, it does not look like they will follow through and conform to the standards.

One of the main questions as a result of this is: What would happen if Japan went further with whale hunting, and set it under a different cloak to say the judgment is abided? And what can the international community do to enforce the judgment?

To answer those questions this review will figure out what the judgment really said; respectively which points are violated by the JARPA II program. And furthermore we will take a look at what kind of measurements there are to enforce a judgment by the ICJ, related to both legislation and negotiation. Additionally we will take a look into the driving forces of whaling in Japan.

This case could be a precedent for the future in Antarctica and of the Antarctic Treaty (AT). Even AT is not violated or affected respectively in that case; it's a prime example of what could happen. E.g. we can assume that a country would step out of the AT and start mining in Antarctica. What can the international community do to prevent this, in a way of legislation? Moreover, what happens in the whaling case will illustrate how good the legal protection of the Southern Ocean and Antarctica currently is, and how much effort international institutions and governments need to put in to secure those laws.

2 The Judgment

The judgment about the case includes several points which were assessed by the judges. Important for this review are only those in which Japan had not abided by.

In Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling, it is written that ‘...any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purpose of scientific subject...’ (Anon, 1946a). Thereby the part ‘for purpose of’ was for the judges a point which is crucial for the process. That part point out that research objectives must be enough to justify a program like JARPA II (Anon, 2014b). Therefore it is important how that program is designed and executed.

The judges agreed that JARPA II does not explain why non-lethal methods, to kill whales, are not applied and that such possibilities are not sufficiently implemented. This point is important because it is related to the need defined data in a specific way. Further is mentioned that the

‘...sample size of fin and humpback whales’ is ‘not large enough to produce ... relevant information...’ and there is a lack in transparency of the program design to take samples in the defined numbers and under the defined methods. There is also no cooperation with other scientific institutions. The needed special permits are not granted by JARPA II. (Anon, 2014b)

Another agreement which could be violated is the Schedule of the Convention. More precisely the paragraphs:

- 7 (b), Southern Ocean Sanctuary
- 10 (d), Factory ship moratorium
- 10 (e), Moratorium on commercial whaling – zero catch limits

(Anon, 1946b)

The judges declared that ‘Japan has not acted in conformity with its obligations in each year of the seasons’ in every point. (Anon, 2014b)

At the end there are remedies which Japan must consider. They are to revoke any permits to kill, take and treat whales under the JARPA II program, and ‘refrain from authorizing or implementing any special permit whaling which is not for purpose of scientific research within the meaning of Article VII’. (Anon, 2014b)

In short the judgment implied that Japans whaling program does not conform to the assumed Convention. The main problem is that there was no evidence of scientific research. Hence JARPA II is illegal by that judgment. Since Japan violated those facts it has breached against the rules of the United Nations (Anon, 1945).

3 Relevance for International Relationships and Agreements

The ICJ is the ‘principal judicial organ of the United Nations’ (Anon, 1945). That is written in article 92 of the United Nations (UN) charter. Since 1956 Japan has been a member of the UN (Anon, n.e.-b). Which is why it is a subject to the UN charter.

Article 94, paragraph 1, said that each member state should comply with decision of the Court, if the state is a case party. Paragraph 2 describes what could happen if a state fails:

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have resource to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

(Anon, 1945)

In relation to that article it is clearly defined what a party can do if the other one does not abide ICJs judgment. In our case that would mean that Australia could go in the next step to the

Security Council. (Llamzon, 2008) mention in his article that this provision, of paragraph 2, distinguish between the Charter and the Statue of ICJ. That shows the difference between adjudicative and post-adjudicative stages in such a case. The ICJ is responsible for decision making, but not for any kind of enforcement of it. The legislation of the UN charter is designed in ways which appeals to states, comply with judgments and apply these in good faith. *Good faith* is defined ‘by the ICJ in one context as a duty ‘to give effect to the judgment of the Court’, said (Llamzon, 2008) – cited by (Justice, 1997).

In Chapter VI and VII of the Charter (Pacific Settlement of Disputes; Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) regulated by law shows how the Security Council - involved in cases of disputes - which steps could be taken. E.g. the articles 39-42 recommend measures in order of negotiation, non-armed force and further ones, if there is a need. Everything is related to the threat of ‘international peace and security’. Article 36, paragraph 3, and defines clear that legal disputes should be referred to ICJ. (Anon, 1945)

That law illustrates clearly what steps should be taken further in a dispute, after a decision by the ICJ, if one party does not comply by the decision. It should be considered that any kind of time frame is not recommended. Moreover, there is freedom for the Security Council to handle every kind of case with different measures and different levels of forces. That means if there is a non-compliance of a party after a judgment it does not mean there is no place for further negotiations.

Important to understand is that there is definitely a way for the party members and the international community to try to enforce the judgment. (Kolb, 2013; Llamzon, 2008; Paulson, 2004) describe several cases with their judgments. Mostly there are disputes about land claiming. That makes it difficult to assume how the time after the whaling judgment could proceed. It is also unclear how other countries can support Australia in the next stages, because they were not a party in the ICJ case.

4 Driving Forces and Threats for Whaling in Japan

Japan has a long-time history of whaling, which goes back to the beginning of the last millennium. Whales were the main resource of food after World War II (catch numbers of more than 27,000 in 1965). In spite of assuming the moratorium on commercial whaling of the IWC – under strong international pressure – Japan did not step back from whaling completely. It used the special permit to allow whaling for scientific purposes. (Kagawa-Fox, 2009)

What is internationally described as action by the Japanese government and most people think it is the willingness of public too, is indeed designed by three institutions:

- **Hogeihan** (Whaling section of the Fisheries Agency within the Ministry of Agriculture, Forestry and Fisheries) [the public face]
- **Nihon Geirui Kenkyusho** (Institution of Cetacean Research – ICR) [focus on research]

- ***Dai Nippon Suisan Kai*** (Japan Fisheries Association – JFA) [major influent of policy making]
(Kagawa-Fox, 2009)

Kagawa-Fox calls those institutions the ‘Whaling Triangle’. The triangle should be mainly responsible for declaring the importance of whaling for Japanese culture, cultural pride and tradition of whaling. At this point we can ask: where is the explanation and justification of those points related to JARPA II?

In that article of Kagawa-Fox it is further mentioned that this is the driving force for Japan's whaling policy. High level positions in the institutions are occupied by ex-bureaucrats, which have a strong influence in policy making. Moreover, the public is not provided with all available information, respectively specific information is simply not published. E.g. news from IWC about the fact that more than 91% of the caught female whales are pregnant (what leads to major public response in Australia and New Zealand) did not reach the Japanese public (Kagawa-Fox, 2009).

Another point is that whaling is strongly subsidized by the government, especially compared to other sectors of fishery (Kagawa-Fox, 2009). That point is revealing the power of the whaling triangle to policy making. And it can be challenged more if we consider what (Anon, 2014a) wrote in his article. There it is mentioned that consumption and sale of whale meat declined strongly in recent years. In the meantime there is more than 4,500 tons of whale meat in stock at warehouses – equal to around 2,300 minke whales. (Anon, 2014a) That means, caught whales from several recent years from the Southern Ocean are still not used. Remember that ICJ said the samples which were taken for research are too small. So, does it make sense for further whaling?

Beside the fact that the government must now spend more money in designing a new research program, the whale factory ship needs a refit or must be substituted in near future, which is also expensive (Kagawa-Fox, 2009).

A comparison of income of whale meat selling (~46.5 million € in 2006-2007) to whale watching (~26.5 million € in 1998) reveal that there is an alternative way to earn money, from an economic point of view (Kagawa-Fox, 2009). Unfortunately there are no current numbers available and the values are transferred with current exchange rates. Thus it is likely that in the meantime both sectors might produce the same outcome or whale watching is already more worthwhile.

The Japanese internet selling company *Rakuten Inc.* (former biggest online trader for whale meat worldwide) has stopped its whale meat trading completely. This is related to a strong international pressure and increase of negative reputation after the ICJ judgment. (Fujita, 2014)

Related to the two points before (Murphy, 2014) mentioned that *Asahi Shimbun* published a survey in April this year that said 14 percent of the Japanese are eating whale meat occasionally or rarely and 37 percent never eat it. Additionally the survey said 85 percent of the people are against a plan to build new whaling ships.

Now we will come to the two most effective pressures, by the international site. The first is coming from the IWC. During the last Summit in September the Commission adopts the ICJ judgment, by 35 to 20 votes. (Osborne, 2014; Ridgwell, 2014) That makes it more difficult for Japan to redesign a program, due to the fact that IWC will take more care about the content of it. Secondly Japan is claiming a group of islands, the Senkaku islands, like China does. Justin McCurry, correspondent of The Guardian in Tokyo, said Japan will very probably need international support in that case. Therefore the government must weigh what is more important, and it is obviously that the dispute with China is more important. (Fensom, 2014)

The listed facts and assumptions in this chapter indicate that whaling does not have strong support by the Japanese public, as it could be assumed if the statements by the government are considered only. Even in Japan there is more evidence that whaling comes under stronger social and public pressure. We have seen that there is a decrease of consumption of whale meat, support for whaling and income of whaling.

5 Conclusion

After the review of the background of possible happenings in the future of whaling in Southern Ocean, mainly by Japan, we have seen that there are several ways how different stakeholders could react. We can distinguish two parts: international (governmental level) and national (governmental, private and public level in Japan).

For the international level we can say that there are several options of a ‘what will happen next’ scenario. Currently Japan reacts in the frame which is provided by ICJ and tries to implement a new scientific whaling program. The outcome is not predictable at the moment. Moreover, there is no evidence for the purpose of that action. We can assume that it is an action of ‘not to lose the face’, but we do not know what the reasons are and how far the decision makers would go.

The national level is more predictable, because we can compare a lot of facts with social and economic behavior of people in other countries. Therefore it is more likely to say that the whaling industry is now in a deep crisis. The judgment of ICJ is not the most crucial factor for that. Since we don’t have enough data in quality and quantity it is just an assumption. It would be hard to find the driving forces at the political level in Japan. Whereas for the economy and the public view is easier to investigate. This could be an approach for international effort to support an anti-whaling behavior of the Japanese.

The review should be considered by every Institution which is related to Antarctica and AT. By its judgment the ICJ opened a new case of international dispute and how it comes to a decision. There are no similar cases around a convention and affected areas like this one. Thus ‘Whaling In The Antarctic (Australia v. Japan: New Zealand Intervening)’ could be a precedent for future disputes.

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